Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments	WC Docket No. 07-245 RM-11293 RM-11303

REPLY COMMENTS OF FIBERTECH NETWORKS, LLC, AND KENTUCKY DATA LINK, INC.

April 22, 2008

SUMMARY

As Chairman Martin has observed, "Continued broadband deployment and infrastructure investment is vital to this country's economic growth." In order to deploy new facilities-based broadband networks, new entrants need access to poles and conduits controlled by the incumbent LECs and utilities. But, as even the utilities concede, "the federal pole attachment regime satisfies no one": the FCC's current complaint-driven process is not working.

Utilities portray themselves as the sole guardians of their networks, who should be able to dictate to all others when, where, and under what terms and conditions access to poles will be permitted. But Congress has twice rejected the utilities' view that they are the lords of the manor, dispensing pole attachments as they wish. Both in passing the 1978 Pole Attachments Act and in amending it in the landmark 1996 Act, Congress established the FCC – or state commissions when they choose to regulate pole attachments – as the congressionally-designated arbiter of what constitutes "just and reasonable" and "nondiscriminatory" access to poles and conduits – not the utilities.

Fibertech and KDL have asked the Commission to codify existing FCC and state decisions that certain utility restrictions are presumptively unreasonable. The FCC has already held that:

- A pole owner's blanket prohibition on attachers' use of the NESC-compliant, standard industry practice of boxing is unreasonably discriminatory.
- It is unreasonable to require preapproval licensing for drop lines, which can be installed with notice to the pole licensor.
- Utilities must allow an attacher to use any trained workers who meet the utilities' requirements for training.
- An ILEC must give its competitors nondiscriminatory access to information about its pole and conduit facilities.

State Commissions have already held that:

- Pole owners must permit attachers to use NESC-compliant practices of boxing and extension arms, where poles are accessible by ladder or bucket truck.
- Maximum timeframes for the completion of make-ready work should be imposed on utilities.
- Where utilities cannot meet reasonable timeframes, attachers can hire utility-approved contractors to perform the survey and make-ready work.
- Where utilities cannot meet reasonable timeframes, attachers can use NESC-compliant temporary attachments to install facilities pending completion of survey and make-ready work
- Attachers shall have access to conduit records, with any necessary redactions.

Fibertech and KDL simply ask that these decisions be incorporated into rules.

Utilities ignore or mischaracterize the actual Fibertech/KDL proposals, preferring to erect and then demolish strawmen. Fibertech and KDL's proposal to establish a presumption that boxing and use of extension arms is permitted where accessible by ladder or bucket truck, for example:

- Does not preempt state law in any state that has certified to regulate pole attachments under the "reverse preemption" provisions of Section 224(c).
- Does require attachers to comply with the NESC, NEC, Telcordia Blue Book, FCC and OSHA regulations, and other applicable state and federal health and safety laws and regulations.
- Does not require the FCC to establish a comprehensive set of engineering regulations for poles.
- Allows the utility to rebut the presumption when specific circumstances warrant it.

Utilities fail to provide anything more than bare generalizations that rules codifying FCC decisions and establishing presumptions based on state experience will harm safety or reliability. Where there are concrete harms, they should, of course, be accommodated. However, the utilities provide no such specifics – because they cannot. Instead, they simply wish to stand as the gatekeepers of competition. But the Act does not permit them to do so, and the FCC should not permit consumers, competition and the American economy to suffer from utility recalcitrance and foot-dragging.

TABLE OF CONTENTS

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Fibertech Networks, LLC ("Fibertech") and Kentucky Data Link, Inc. ("KDL") hereby submit these reply comments in response to the comments filed on the Commission's Notice of Proposed Rulemaking.[1]

I. INTRODUCTION

On the issue of fair and nondiscriminatory access to poles and conduit, the record in this proceeding reveals considerable common ground. At first blush, this may be surprising given the breadth of this proceeding and the diversity of interested parties. But, in reality, *all* parties share a common goal: ensuring that new entrants deploying advanced telecommunications facilities can safely and efficiently obtain the statutorily required non-discriminatory access to poles and conduit to which they are entitled, without compromising the integrity of pole infrastructure, network safety or reliability.

The current regulatory regime is not working and cannot effectively achieve this

[1] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, WC Docket No. 07-245 (2007) ("*Pole Attachment NPRM*" or "*NPRM*").

goal. As Ameren told the Commission in its comments, "the federal pole attachment regime satisfies no one."[2] After ten years of experience, there is consensus among electric utilities, incumbent local exchange carriers ("ILECs"), cable companies, wireless providers and competitive facilities-based service providers like Fibertech and KDL that reform is needed.

Fibertech and KDL's experiences, which the comments show are shared by attaching entities throughout the industry and across the country, highlight a central problem with the regulatory approach now in place, a problem only exacerbated by technological developments, convergence, and competition. By giving pole and conduit owners substantial case-by-case discretion over attachers' access, the current regulatory scheme inevitably creates opportunities for owners to delay or limit competitors' access. As Comcast explains in its comments, "[t]he business incentives for electric and telephone utilities to harm cable operators through abusive pole rates and practices have never been greater. Electric utilities are offering BPL and fiber technologies to compete with cable and competitive telecommunications services, while the voice/data/video competition between cable and ILECS continues to intensify. Meanwhile, the Commission, Congress, and the courts have all found that monopoly bargaining power still lies in the hands of the pole owners."[3] Absent additional constraint on this power, the pole owners assuredly will seek to avoid effective competition by continuing policies that prevent deployment of the most modern and technologically refined broadband networks.

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[2] Comments of Ameren Services Company and Virginia Electric and Power Company at 2, WC Docket No. 07-245 (filed Mar. 7, 2008). Unless otherwise noted, all Comments hereinafter refer to FCC WC Docket No. 07-245.

[3] Comments of Comcast Corporation at 11-12 (filed Mar. 7, 2008).

All parties can agree that, to implement the statutory requirement that access to poles and conduit be just, reasonable, and non-discriminatory, the Commission's regulatory regime must strike a balance. No one disputes that the regulatory regime must be structured to protect pole and conduit owning utilities' legitimate concerns about safety and reliability. But it must also prohibit utility practices that cause delay and limit access where safety and reliability are only a pretext for utilities that seek competitive advantage or monopoly rents. The current ad-hoc complaint process is inadequate to balance these objectives properly and efficiently. As Fibertech explained in its petition,[4] and the comments on the *NPRM* confirm, it fails to properly align utilities' incentives, takes too much time, lacks transparency, and wastes resources. In its comments, CURRENT Group, LLC ("CURRENT"), the nation's largest Broadband over Powerline ("BPL") operator, summarizes the problems well:

> Even when confronted with an issue squarely addressed by the Commission's rules or prior orders, utilities . . . often seek to delay potential competitors' market entry – and raise their costs – by forcing them to engage in disputes over well-settled issues. Pole owners frequently settle such conflicts before they develop into actual litigation – or at least before final resolution of a complaint – but not before the would-be attacher has been forced significantly to delay its build-out plans and to incur the expense of such a delay, as well as that of the litigation itself. The cycle described above is all too familiar to attachers, and the reason for it is plain: Pole owners have nothing to lose by taking patently unlawful positions, pushing attachers to the point of seeking legal redress and beyond and (sometimes) relenting after causing long delays and significant costs.[5]

The record is clear. After nearly a decade, reform is badly needed.

Fibertech and KDL's proposed rules, which set forth best practices in accord with current FCC precedent, state commission decisions, and utility practices, provide a far

[4] Petition for Rulemaking of Fibertech Networks, RM-11303 (filed Dec. 7, 2005) ("Fibertech's Petition").

[5] Comments of CURRENT Group, LLC at 3 (filed Mar. 7, 2008).

superior result that is less burdensome for all parties and this Commission, as well as a result that is more likely to be effective and efficient without compromising network safety and reliability. Fibertech and KDL urge reform of the federal regulatory regime as follows. For those issues specifically addressed, access to poles and conduit under the terms of Fibertech and KDL's proposed rules that is consistent with uniform safety and engineering codes and standards, as well as federal and state law, must be presumed to be reasonable. While utilities may rebut that presumption to delay or deny access to a particular pole, they may do so only for reasons of "insufficient capacity" "safety, reliability and generally applicable engineering purposes" as set forth in 47 U.S.C. § 224(f)(2). For example, per se bans by utilities on practices like the use of NESC-compliant boxing or extension arms, cannot meet this test. Delaying or denying such lawful access is an unjust and unreasonable practice that should be subject to penalty. Access that does not comply with procedures for obtaining access to poles and conduit set out in Fibertech and KDL's proposed federal rules, state rules or relevant safety and engineering codes is unlawful and should be prohibited.

Where there are disagreements in the record, particularly with the electric utility companies, they primarily arise from a misunderstanding of Fibertech and KDL's proposals, as explained further below. As a general matter, however, Fibertech and KDL reiterate that these rules do not threaten network safety and reliability, but rather specifically incorporate safety and reliability standards and concerns. While certain electric utilities claim otherwise, their cries predict catastrophe but lack factual support. Categorical objections in particular – such as a categorical prohibition on boxing – must be rejected in light of experience. The proposed rules, moreover, do not attempt to be

one-size-fits all. Rather, they establish rebuttable presumptions to ensure that utility practices that will delay or deny access result from real, non-pretextual safety and reliability concerns.

While it is true that Fibertech and KDL's approach moves away from an ex post, ad hoc complaint process toward ex ante affirmative standards and rules, this move is necessary. The proposed ex ante rules will increase transparency, provide clarity and faster deployment of broadband and telecommunications services through fixed timeframes for make-ready work, end wasteful re-litigation, reduce regulatory intervention, and discourage imposition of unnecessary delays and costs. Most importantly, the proposed rules will facilitate the fair and nondiscriminatory access to poles and conduits mandated by Congress in the 1978 Pole Attachments Act and the Telecommunications Act of 1996 and necessary for consumers to benefit from the deployment of advanced telecommunications facilities and competition in high capacity fiber optic service. The current approach, which grants utilities excessive discretion that can be checked only by a slow, costly, and wasteful complaint process, has failed to fulfill these goals. Adopting rules like those proposed by Fibertech and KDL is the most efficient way for the Commission to fulfill its statutory mandate.

II. THE COMMENTS CONFIRM THAT REFORM IS NEEDED TO ENSURE SAFE, NON-DISCRIMINATORY ACCESS TO POLES AND CONDUIT

A. Attachers Across the Telecommunications Landscape Support Fibertech and KDL's Solutions to Their Common Problems Obtaining Access to Poles and Conduits.

The comments on the Commission's *NPRM* demonstrate that Fibertech and KDL's experiences are not isolated incidents but common problems faced by cable companies, wireless companies, and wholesale competitive carriers, all of whom need

access to poles and conduits to provide the competitive facilities-based services essential to driving innovation and reducing prices. Briefly reviewing the submissions by various attachers confirms that the current pole attachment system is broken, and is an obstacle to the development of facilities-based last-mile competition. Attachers from all corners of the telecommunications industry express support for Fibertech and KDL's proposals.

Alpheus Communications, L.P., and 360networks (USA), Inc., for example, filed joint comments embracing the adoption of rules to standardize terms and conditions of access to poles, ducts, and conduit. These commenters explain that the increased uncertainty, delays, and costs inherent in the current ad hoc system make "it extremely difficult to introduce services to market or set delivery intervals on potential sales."[6] Specifically, they urge the Commission to "establish shorter make-ready timeframes, allow utility-approved contractors to perform field surveys and providers to search utility records, permit use of boxing and extension arms, and require installation of drop lines without prior licensing."[7] In addition, these commenters argue that the use of contractors for access to poles and conduit could be modeled on the current practice of using independent contractors in virtual collocation situations, noting that AT&T has a list of approved contractors that a collocator can hire to do any work in its virtual collocation sites. Pole owners could mirror such practices by providing would-be attachers with a list of approved contractors or alternatively develop an accreditation program to ensure

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[6] Joint Comments of Alpheus Communications, L.P. and 360Networks (USA), Inc. at 2 (filed Mar. 7, 2008).

[7] *Id.* at 2. As they explain, "[u]tilities frequently use boxing and extension arms for their own facilities but prohibit competitive providers from using these space- and cost-saving methods with no rational explanation. Competitive providers should be able to use both boxing and extension arms when they would render unnecessary a pole replacement or rearrangement of another carriers' facilities, unless a facility is inaccessible by a ladder or bucket truck." *Id.* at 3.

that contractors have any needed training.[8]

Cavalier Telephone, LLC similarly focuses its comments on the terms and conditions of access to poles, explaining that its "ability to deploy voice and broadband services has often been undermined because of delays and unreasonable charges relating to access to utility poles."[9] Cavalier thus supports the adoption of rules like those proposed by Fibertech and KDL to fulfill the Commission's goal of expanding facilities-based competition.[10] In addition, Cavalier recommends that the Commission require that pole owners employ a single entity to coordinate and complete needed make-ready work. Fibertech and KDL support this proposal. Indeed, as we explained in our initial comments, creating a neutral third-party administrator to oversee and coordinate access to poles and conduits may be the only way to achieve true competitive neutrality.

Describing problems similar to those faced by Fibertech and KDL, Time Warner Telecom Inc. ("Time Warner"), One Communications Group ("One"), and Comptel report that pole owners have in many cases: not allowed extension arms or boxing, taken months or years to review applications for make-ready work or pole availability, needlessly replaced poles and charged attachers, and placed the onus of incorrect billings onto new attachers.[11] These commenters confirm that rules are needed to resolve these issues, citing examples where utilities have continued to insist on certain practices even after the Commission has deemed them unreasonable, thereby forcing attachers to waste

[8] *Id.* at 3.

[9] Comments of Cavalier Telephone, LLC at 1 (filed Mar. 7, 2008).

[10] *See id.* at 2-3.

[11] Comments of Time Warner Telecom Inc. One Communications Corp. and Comptel at 15 (filed Mar. 7, 2008).

money and time to relitigate previously decided issues.[12] Thus, Time Warner, One, and Comptel ask the Commission to adopt rules, like those proposed by Fibertech and KDL, that would diminish the inefficiency created by pole owners' anticompetitive actions.[13] SegTEL likewise believes that rules to standardize terms and conditions of access are needed because the "efficient utilization of existing utility poles and conduits is essential for the development of competition."[14] SegTEL urges the Commission to adopt rules that include timeframe requirements for the completion of make-ready work, allow competitors or approved independent contractors to perform searches and surveys, permit boxing and extension arms where consistent with the NESC, and allow the installation of drop lines without prior licensing.[15] WOW! Internet Cable and Telephone, which acquired Sigecom, LLC, a CLEC offering facilities-based services, resubmitted Sigecom's comments, which also largely embrace the proposals set forth in Fibertech's Petition.[16]

In its comments, Crown Castle Solutions Corp. explains that the Commission's current regulatory regime impedes deployment of its distributed antenna system ("DAS") network by creating project delays and uncertainty that affect its "ability to respond to its customers [sic] coverage needs."[17] Crown Castle asserts that the delays and costs are due to "benign indifference" rather than anticompetitive incentives. But whatever the reason,

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[12] *Id.* at 20-22.

[13] *Id.* at 17-18.

[14] Comments of segTEL, Inc. at 2 (filed Mar. 7, 2008).

[15] *See id.* at 4-12.

[16] Comments of Wow! Internet Cable and Phone at 3-8 (filed Mar. 7, 2008); *see also* Comments of Sigecom, LLC at 3-8, Docket No. RM-11303 (filed Jan. 27, 2006). (WOW! resubmits Sigecom's comments as its own.)

[17] Comments of Crown Castle Solutions Corp. at 2 (filed Mar. 7, 2008).

Fibertech, KDL, and Crown Castle agree that the Commission should adopt the proposed best practices to ensure the non-discriminatory access needed for timely deployment.[18] Other DAS operators and wireless providers also support Fibertech and KDL's proposed rules. NextG Networks Inc., for example, describes pole owners' recalcitrance and the resulting delays in make-ready work and post-construction surveys, citing one incident where the utility failed to perform or even provide a timeline for the work on fourteen poles, work which NextG had *already paid for*, until six months after its request, and then only after contact from NextG's attorney.[19]

As mentioned above, CURRENT, a leading BPL provider, also supports Fibertech and KDL's proposed rules. Specifically, CURRENT urges the Commission to adopt the proposals concerning boxing and extension arms, explaining that many pole owners continue to preclude these practices today even where there are no safety or reliability concerns.[20] In addition, CURRENT echoes Fibertech and KDL's proposal that the Commission should require utilities to permit temporary attachments.[21] CURRENT reiterates that because temporary attachments "are expressly contemplated by the NESC," are explicitly permitted by New York, and are common in other states, "there should be a strong presumption against any utility seeking to prohibit such attachments."[22]

Knology, Inc.'s comments stress problems with utilities' make ready practices much like those experienced by Fibertech and KDL. As its comments explain, "[w]hen

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[18] *Id.* at 7-9.

[19] Initial Comments of NextG Networks, Inc. at 20-21 (filed Mar. 7, 2008).

[20] Comments of Current Group, LLC at 10 (filed Mar. 7, 2008).

[21] *Id.* at 6-7.

[22] *Id.*

utilities engage in unreasonable make-ready practices and the resulting lop-sided negotiations fail, attachers are left without any time-effective recourse."[23] The slow and unpredictable make-ready process of most utilities leads to delays in network investments as well as delays in consumer services. To "combat unreasonable delay," Knology was required to pay for two full-time utility employees who would devote their time to completing its make-ready work, adding costs of over $500,000.[24]

Sunesys, LLC's comments also focus on utilities' lack of incentive to facilitate the timely access that is critical for the deployment of broadband and telecommunications services. Fibertech and KDL agree with Sunesys that "[a] maximum period [allowed to pole owners for completion of make–ready work] is unquestionably necessary. If broadband deployment is to reach its potential, the year-long (and sometimes multi-year) delays for pole attachments must come to an end – and they must come to an end now."[25] Sunesys, however, proposes that such work be completed in six months, a timeframe it says is "extremely generous."[26] In fact, six months is excessive as a general matter and, in any event, certainly cannot apply to drops or to requests involving only a few poles. While Fibertech and KDL agree that there must be a maximum time set for the completion of make ready, the Commission should adopt Fibertech and KDL's proposal that calls for completion of make-ready work in 25 days for very small jobs and within 45 days for other applications. In this way, access to poles and conduits – especially, but not exclusively, for service drops – may be analogized to number porting: for competition to

[23] Comments of Knology, Inc. at 20 (filed Mar. 7, 2008).

[24] *Id.* at 21.

[25] Comments of Sunesys, LLC Regarding Rates, Terms and Conditions of Access to Utility Poles at 15 (filed Mar. 7, 2008).

[26] *Id.*

work, regulations need to facilitate consumers' ability to switch providers without unnecessary delay.

B. The Commission Should Follow Its Precedent Prohibiting Penalties in Addition to Damages for Unauthorized Attachment, But, If Permitted, Penalties Should Be Imposed Both for Unlawful Attachments and Unlawfully Denying or Delaying Access.

A number of utilities have raised concerns about unauthorized attachments and proposed that utilities be allowed to impose penalties in addition to damages for unauthorized attachments.[27] But the Commission has clearly and properly held that pole attachment agreements assessing such penalties for unauthorized attachments are not permissible.[28] In *Mile Hi Cable Partners, L.P. v. Public Service Co. of Colorado*, the Commission applied general contract principles to prohibit the enforcement of unreasonable penalties for unauthorized attachments, and limited the utility to compensatory damages where there was no specific record to support punitive damages.[29] In 2007, the Commission affirmed this holding in its *Salsgiver* decision. In addition, prohibiting automatic penalties for unauthorized attachments is consistent with FCC jurisprudence precluding liquidated damages in the context of Section 208 complaints against common carriers. Proponents of such penalties point to no legal authority permitting the unilateral imposition of penalties by utilities without a finding of liability in a complaint. Indeed, authorizing such a practice would be particularly problematic given the lack of reliable data on unauthorized attachments. Careful consideration must

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[27] *See, e.g.*, Initial Comments of Florida Power & Light, Tampa Electric And Progress Energy Florida Regarding Safety and Reliability at 13 (filed Mar. 7, 2008); Comments of the Coalition of Concerned Utilities at 77 (filed Mar. 7, 2008); Comments of the Edison Electric Institute and the Utilities Telecom Council at 80 (filed Mar. 7, 2008).

[28] *See Mile Hi Cable Partners, LP v. Pub. Serv. Co. of Colo.*, Order, 17 FCC Rcd 6268, 6272-73 (2002) ("*Mile Hi Cable*"); *Salsgiver Communications, Inc. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20536, 20545 (2007) ("*Salsgiver*").

[29] *See Mile Hi Cable*, 17 FCC Rcd at 6271-73.

be given to how to determine when an attachment is "unauthorized,"[30] as utility statistics have often proven to be inflated and unreliable. Time Warner explains: "allegations about 'unauthorized attachments' are often based on the utilities' shoddy recordkeeping and their after-the-fact efforts to change historic pole attachment practices."[31]

If, however, the FCC concludes penalties for unauthorized attachments are reasonable, they should only be permitted as a part of overall reform of the regulatory approach to pole and conduit access – including adoption of Fibertech and KDL's rules and corresponding penalties for unreasonably denying or delaying access. CURRENT, for example, urges the adoption of an explicit policy authorizing penalties against utilities that unlawfully deny access to their poles. As CURRENT explains, "[t]he absence of such a policy is simply an invitation for pole owners to continue to flout Congress's directives as well as the Commission's pole attachment rules and orders."[32] If the Commission authorizes penalties for unauthorized attachments, Fibertech and KDL support CURRENT's proposal that the Commission explicitly authorize penalties against utilities that unlawfully deny access to their poles.

Further, before allowing utilities to impose penalties for unauthorized attachments, the Commission must take certain steps to rationalize the determination of whether an attachment is "unathorized." First, the absence of a written record of licensing should not be adequate to prove that the attachment was unauthorized. For example, if the safety violation is on a pole that is part of a long pole line to which the

[30] Utilities also assert that were there is a safety violation associated with an unauthorized attachment, there should be a presumption that the party without the license created the violation. But the validity of this approach turns on how an attachment is determined to be "unauthorized." *See infra* at 12-13.

[31] Comments of Time Warner Cable Inc. at 54 (filed Mar. 7, 2008).

[32] Comments of Current Group, LLC at 4 (filed Mar. 7, 2008).

third party is attached, and virtually all of its attachments on the pole line are properly installed, this would indicate that the attachments were made pursuant to the licensing process. Second, drop lines, attached in compliance with NESC standards with proper notice to the pole owner, should not be considered unauthorized attachments. Indeed, the Commission should once and for all make clear that drops with notice are *authorized*, not unauthorized, as the Commission has held in *Mile-Hi* and *Salsgiver*. Third, streamlining the attachment process and adopting Fibertech and KDL's reforms is a critical prerequisite to the automatic imposition of penalties for unauthorized attachments. Under the current regulatory regime, utilities' unreasonable delays and costs can sometimes force an attacher to resort to self-help. With a reformed regulatory regime, standardized attachment processes, and clear rules, there will be much less incentive for such self help, and penalties can be more reasonably imposed.

C. Fibertech and KDL Support Many of the New Access Related Proposals in the Record.

The record contains a number of other proposals with regard to access to poles and conduit. Fibertech and KDL support many of these proposals if they are incorporated into the reforms proposed in Fibertech's Petition and our initial comments. For example, Fibertech and KDL do not oppose proposals to allow a utility or third party attacher to bring a complaint against an attacher. Nor do Fibertech or KDL oppose utilities' call to clarify and strengthen notice requirements for attachments other than the drop lines and temporary attachments described in our initial comments.[33]

[33] Comments of the Edison Electric Institute and the Utilities Telecom Council at 73 (filed Mar. 7, 2008).

III. UTILITIES' CONCERNS MISUNDERSTAND FIBERTECH AND KDL'S PROPOSALS AND ARE, IN ANY EVENT, UNFOUNDED.

By either misconstruing or misunderstanding Fibertech and KDL's proposed rules, utilities erect false "strawmen" and then contend that the "strawmen" rules pose legal problems or safety, security, and reliability concerns. Such fears are ill-founded and illusory.

A. None of Fibertech and KDL's Proposed Rules Would Impair Safety, Reliability, or Security.

Fibertech's proposed rules require compliance with NESC, NEC, Blue Book, and Federal and state health and safety regulations (including FCC and OSHA requirements), are consistent with existing FCC and state precedents, and mirror existing practices of the more fair-minded pole owners in the industry. Contrary to some electric utilities' suggestions, Fibertech and KDL are not asking the FCC to develop "an exhaustive list of specific safety and reliability standards."[34] Rather they ask the FCC to affirm that certain practices – those already approved by this Commission and state commissions or practiced by some utilities – are presumptively reasonable and cannot be categorically prohibited on safety, reliability or engineering grounds. These proposed rules, moreover, all incorporate and require compliance with NESC and other safety codes as the best practice for all interested parties. The Edison Electric Institute and Utilities Telecom Council, for example, assert that a "utilit[y] should at least be able to rely on the NESC" as a reflection of just and reasonable practice.[35] Fibertech and KDL ask only the same thing for attachers.

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[34] *Id.* at 73-74; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16070 (¶ 1148) (1996) ("*Local Competition Order*").

[35] Comments of the Edison Electric Institute and the Utilities Telecom Council at 68 (filed Mar. 7, 2008).

B. Fibertech and KDL's Rules Would Not Displace State Authority.

Nor do Fibertech and KDL seek to displace any state authority.[36] The proposed rules would not affect pole owners in states that have adopted regulations in "reverse-preemption" of FCC rules pursuant to section 224(c). We recognize that the FCC has deferred to state pole attachment regulations where they have been enacted, and believe the Commission should continue to do so. Where any of Fibertech and KDL's proposals are inconsistent with state law or regulations in states that regulate pole attachments, they would give way. Thus, for example, Oregon's anti-boxing rule, as ill-conceived as it is, *see infra* at 19-21, would not be preempted by proposed rules because Oregon has certified to the FCC that it regulates poles, and thus the FCC rules are not binding in Oregon.[37]

C. While Fibertech and KDL Recognize the Need for Flexibility in Pole and Conduit Access, the Commission's Regulations Must Counter the Negative Consequences of Unchecked Discretion.

When the FCC declined to adopt specific rules in 1996, it also stated that it would "monitor the effect of this approach and propose more specific rules at a later date if reasonably necessary to facilitate access and the development of competition in telecommunications and cable services."[38] That "later date" is now upon us. For the reasons in Fibertech's Petition and echoed in the record here, the Commission's current regulatory approach no longer strikes the appropriate balance between the need for uniform, non-discriminatory pole and conduit practices, on the one hand, and the need for

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[36] *See id.* at 61-66.

[37] Of course, Section 253 still prohibits Oregon from enacting rules that prohibit or have the effect of prohibiting any entity from providing telecommunications services. *See* 47 U.S.C. § 253. But this is true irrespective of whether the Commission adopts the Fibertech and KDL proposed rules.

[38] *See Local Competition Order*, 11 FCC Rcd at 16068 (¶ 1143).

flexibility, on the other.

Fibertech and KDL understand that utilities seek to retain flexibility in governing access to poles and conduit. But when wielded by a competitor, too much flexibility has proven inherently susceptible to anticompetitive manipulation. And when wielded by a monopolist, too much flexibility has proven inherently susceptible to the incentive to obtain monopoly rents. Utilities attempt to seek refuge in arguments that rest on the alleged need to preserve pole owners' case-by-case discretion, and admit no objective regulatory oversight. When placed in perspective, these arguments must be rejected – the Commission cannot abandon its statutory obligation to ensure just, reasonable, and non-discriminatory access to poles and conduit. The obvious incentive for ILECs and electric companies to hinder access and raise the costs of competitors provides sufficient justification for the Commission to limit their ability to accomplish that end. Fibertech and KDL's proposed rules have been carefully drafted to constrain unbridled pole owner discretion that enables anticompetitive and/or monopolistic conduct, while preserving sufficient flexibility to ensure safety and reliability.

Fibertech and KDL understand that some utilities have adopted operational requirements in excess of national safety codes and state regulations. But these utility-specific codes cannot be shields for unjust, unreasonable, or discriminatory pole and conduit practices. To begin with, Fibertech and KDL's experience is that some utilities claim that these standards are confidential and refuse to disclose their policies. This is unacceptable. At a minimum, any documents setting forth utility-specific requirements in excess of the NESC and other codes must be made publicly available to ensure that such requirements are non-discriminatorily applied to all attachers.

Moreover, while the NESC recognizes that utilities may impose additional requirements, the NESC sets forth what is universally required for safety and reliability. As stated in the IEEE's NESC Handbook: "In essence, the rules of the NESC give the basic requirements of construction that are necessary for safety. If the responsible party wishes to exceed these requirements for any reason, he may do so for his own purpose, but need not do so for safety purposes."[39] Some utilities suggest that the NESC code is best considered as a "minimum" for safety requirements. Not so. In fact, the 1990 edition of the NESC was specifically revised to remove the use of the word "minimum" to prevent "intentional or inadvertent misuse of the term by some to imply that the NESC values were some kind of minimum number that should be exceeded in practice."[40] To the contrary, "[t]he NESC is the best information that we have about what needs to be done and what must not be done in various circumstances. . . . The NESC is *the* national standard for safety in the installation, maintenance, and operation of electric supply and communication system facilities."[41] Thus, Fibertech and KDL propose that any requirements in excess of the NESC standards should be met at the pole owners' expense. For example, where the conditions of Fibertech and KDL's proposed rule on boxing are satisfied and the utility does not rebut the presumption that boxing is reasonable, a utility may nevertheless prohibit boxing so long as it pays for any resulting make-ready work.[42]

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[39] NESC Handbook: A Discussion of the National Electrical Safety Code, Rule 010 (Purpose), p.5 (Allen L. Clapp ed., IEEE Press 6th edition) (2006).

[40] *Id.*

[41] *Id*.

[42] While resolving these issues and completing additional make-ready work could lead to licensing delays, adopting Fibertech and KDL's other proposals will mitigate this risk.

D. The Commission Has the Authority to Adopt Fibertech and KDL's Proposed Rules.

Some utilities contend that the FCC's authority with respect to electric utilities is limited to regulating attachment rates and only ensuring non-discrimination through the complaint process.[43] Thus, they say, the Commission cannot regulate electric utility practices affecting safety, reliability, and engineering standards. While, to be sure, the FCC does not have plenary authority over electric utilities, the Commission must reject such a crabbed reading of its regulatory authority as flatly inconsistent with the statute.

Section 224 establishes the Commission's authority to ensure that access to poles and conduit is just, reasonable, and nondiscriminatory – even where the poles and conduit are owned by electric utilities. To begin with, electric utilities are expressly included within the statute.[44] Furthermore, the electric utilities seem to ignore section 224(b), which gives the Commission clear authority to regulate the rates, *terms, and conditions* of pole attachments "to provide that [they] are just and reasonable," *id.* § 224(b), as well as nondiscriminatory. *Id.* § 224(f). "Terms and conditions" surely includes the practices governing attachers' access to poles and conduit. While issues of safety, reliability, or engineering are expressly mentioned in 224(f), they clearly can (and should) be considered as a part of any just and reasonable analysis under 224(b). Thus, the FCC has both the authority and the obligation to take action and regulate as necessary to fulfill that statutory mandate. While Section 224 refers to the enforcement of complaints, that language does not mean that the FCC lacks authority to adopt rules. Rules are routinely enforced through complaints, like those brought under Section 207 and 208. Resolution

[43] *See* Initial Comments of Florida Power & Light, Tampa Electric And Progress Energy Florida Regarding Safety and Reliability at 9-10 (filed Mar. 7, 2008).

[44] *See* 47 U.S.C. § 224(a)(1), (f).

through enforcement does not preclude rules establishing either per se restrictions or presumptions to guide the adjudicatory process. In any event, the presumptions set forth in the proposed rules would not be barred even under this erroneous interpretation of the statute because such presumptions primarily serve as mechanisms for allocating the burden of proof in a complaint process. Moreover, the FCC retains its usual authority to choose between rulemaking and adjudication as the means to set out policy that fulfils its statutory mandate.[45]

E. Utilities' Criticisms of Fibertech and KDL's Specific Proposals are Misguided and, In Any Event, Unsupported.

Once again, utility commenters offer rhetorical opposition to specific proposed rules, claiming that they endanger the integrity of pole infrastructure, network safety and reliability, and homeland security. But upon an accurate reading of the proposed rules, none of these claims is substantiated.

1. Boxing and Extension Arms.

On permitting boxing and extension arms, for example, utilities claim that the practices make poles harder to climb, raise concerns about the cantilever effect,[46] and complain that boxing makes changing out poles more costly.[47] The Oregon Public Utility Commission ("Oregon PUC") goes so far as to claim that boxing "violates NESC Rule 213 (Accessibility) or other related rules including, but not limited to: a) Rule 236 (Climbing Space); b) Rule 237 (Working Space); c) Rule 238 (Vertical Clearance

[45] *See SEC v. Chenery Corp.*, 332 U.S. 194, 207 (1947).

[46] Although the utilities defend prohibiting CLEC's from using extension arms by pointing to stress that an arm-supported attachment purportedly can apply to a pole, they fail to acknowledge the stress-reducing effect exerted by an attachment that boxes a pole.

[47] Initial Comments of Florida Power & Light, Tampa Electric And Progress Energy Florida Regarding Safety and Reliability at 18-19 (filed Mar. 7, 2008); Comments of the Edison Electric Institute and the Utilities Telecom Council at 84-86 (filed Mar. 7, 2008); Comments of the Coalition of Concerned Utilities at 81-84 (filed Mar. 7, 2008).

between Certain Communications and [Electric] Supply Facilities located on the same Structure); and d) Rule 238E (Communications Worker Safety Zone)."[48] None of this is correct.

As the Maine PUC concluded after analyzing this issue "[n]either the NESC nor the Blue Book prohibit or restrict boxing. On the contrary, the Blue Book contains information illustrating how to properly box a pole."[49] A review of the specific NESC provisions cited by the Oregon PUC bears this out. Rule 213 of that code merely requires accessibility and does not state that boxing prevents accessibility. Because NESC Rule 236 applies "only to portions of structures that workers ascend," it does not apply where a pole is reached without climbing. Rule 237 of the NESC establishes three requirements: the first two relate to electrical conductors and the third, to the extent that it applies to communications lines, does not prohibit boxing. A communications line that boxes a pole still complies with the vertical height requirement of Rule 235 and therefore complies with 237B(3). Finally, Rule 238, including Rule 238(e), establishes the required clearance between electric facilities and communications facilities. These clearance rules – essentially that 40 inches shall separate energized electric facilities (at secondary-level voltage) and communications facilities – must be satisfied by vertical clearance, and they apply regardless of whether the communications line is on the street or field side of the pole. Therefore, Rule 238 has no bearing on boxing.

Alternatively, the Oregon PUC, like many of the utility commenters, claims that even "if the NESC did not prohibit boxing, very serious safety concerns would arise . . .

[48] Public Utility Commission of Oregon Comments to Docket No. FCC 07-187 at 5 (filed Mar. 4, 2008).

[49] *See, e.g., Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Order at 15, Docket No. 2005-486 (Maine PUC Oct. 26, 2006) ("*Maine Order*"), *aff'd in part and modified in part* Order on Reconsideration (Maine PUC Feb. 28, 2007) ("*Maine Recon Order*").

whenever a person climbs a pole . . . which creates an unwanted safety condition."[50] But this is why Fibertech and KDL have structured the rule such that the right to box is premised upon the pole being accessible by ladder or bucket truck.

More generally, these critics misunderstand the Fibertech and KDL proposal, which would make boxing presumptively reasonable when consistent with the NESC. Under the proposed rule, utilities would always be free to rebut that presumption. Utilities also misunderstand the nature of the problem. The Coalition of Concerned Utilities, for example, asks the Commission to clarify that utilities can prohibit these practices going forward so long as they do so in a nondiscriminatory manner.[51] But a forward-looking ban on boxing discriminates against new attachers who cannot overlash, particularly where existing providers used boxing to deploy their networks. More importantly, none of the critics explains why boxing and extension arms are permissible and presumed reasonable in Maine and New York, but not in other states by other utilities. The utilities ignore the Commission's duty to ensure that the terms and conditions for attachments are just and reasonable, not just non-discriminatory.

2. Make-Ready Timeframes.

In response to Fibertech and KDL's call for shorter make-ready timeframes, the utilities' main criticism is that the 45 day proposal in Fibertech's petition "fails to take into account variables that can affect the time requirement."[52] The revised proposal in Fibertech and KDL's comments addresses this – requiring shorter make-ready timeframes for smaller jobs and allowing for longer, but still limited, timeframes where

[50] Public Utility Commission of Oregon Comments to Docket No. FCC 07-187 at 5 (filed Mar. 4, 2008)

[51] Comments of the Coalition of Concerned Utilities at 84 (filed Mar. 7, 2008).

[52] Comments of the Edison Electric Institute and the Utilities Telecom Council at 86 (filed Mar. 7, 2008).

more extensive work is required. But a maximum deadline is necessary to ensure that access is not unreasonably delayed and to allow providers to make necessary commitments to potential customers. Two Florida utilities agree that "timelines might not be a problem for small jobs."[53]

The Coalition for Concerned Utilities suggests that timelines could be met if attachers are willing to pay overtime.[54] That is unacceptable – utilities should be able to meet these reasonable time frames; but if they cannot they should give the attacher the option to chose between paying overtime, engaging a utility-approved contractor, or erecting temporary attachments (which the attacher will need to pay to convert once the make-ready is completed).

3. Use of Utility-Approved Contractors.

Fibertech and KDL's proposed rule that pole and conduit owners be required to allow competitors to hire utility-approved contractors to perform field surveys, make-ready determinations, and make-ready work simply codifies existing Commission orders.[55] Entirely disregarding this precedent, several utilities' claim that using utility-approved contractors is dangerous because they may not have full information about the network, such as possible utility plans for using the poles to which a license application relates.[56] But proper notice and disclosures could remedy any such problems. The utilities' other main complaint about this proposal is that allowing utility-approved

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[53] Initial Comments of Florida Power & Light, Tampa Electric And Progress Energy Florida Regarding Safety and Reliability at 20 (filed Mar. 7, 2008).

[54] Comments of the Coalition of Concerned Utilities at 86 (filed Mar. 7, 2008).

[55] *Local Competition Order*, 11 FCC Rcd at 16083 (¶ 1182) (establishing that a "utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria").

[56] Comments of the Coalition of Concerned Utilities at 86 (filed Mar. 7, 2008)

contractors to perform such work will disrupt the labor pool by threatening contractor availability.[57] While this could possibly be true as a temporary matter, the market will take care of any such labor supply problem. A near-term shortage of contractors should attract more firms to seek the necessary training and certification, adding both jobs and competition. The Coalition of Concerned Utilities claims that even if independent contractors are used for survey and make-ready work, attachers will face delays because of the requirement that utility inspectors be available to oversee and approve the work.[58] But such a supervision requirement should only be allowed if the utility would also require supervision if the same work were done for the utility. Moreover, hiring additional inspectors should not be objectionable to the utilities, because inspection work is paid for by the license applicants.

4. Drop Lines.

While utilities decry Fibertech and KDL's proposal on drop lines as dangerous, they never explain why they are permissible for cable lines, *see Mile Hi Cable*,[59] but not for fiber lines – which are even lighter than coaxial cable. As the Commission has already held,[60] drop lines should be permitted with notice to the utility. Notably, fiber-optic drop lines do not present a safety concern. Under Fibertech and KDL's proposal, permitted fiber drop lines would be NESC compliant. In contrast to a copper or coaxial cable, fiber drop lines cannot carry an electric current. In addition, if a drop line is installed in a manner to which the pole owner objects after inspecting the attachment, the

[57] Comments of the Coalition of Concerned Utilities at 88 (filed Mar. 7, 2008); Initial Comments of Florida Power & Light, Tampa Electric and Progress Energy Florida Regarding Safety and Reliability at 21 (filed Mar. 7, 2008).

[58] *Id.* at 89.

[59] *See Mile Hi Cable,* 17 FCC Rcd at 6272-73.

[60] *See Mile Hi Cable,* 17 FCC Rcd at 6272-73; *Salsgiver Communications,* 22 FCC Rcd at 20543-45.

line, having been installed without support strand or through-bolts, can easily be adjusted at the attachers' expense to comply with the owner's preferences.[61]

5. Conduit.

As proposed, Fibertech and KDL's rules concerning access to conduits were broadly applicable to all conduit. We now believe that much of the benefit of these proposals could still be achieved even if the rules are limited to ILEC underground facilities. As the Coalition of Concerned Utilities explains, ILEC and Electric underground facilities are different because of the extra precautions needed when working in electric conduit.[62] This appears substantiated – as OSHA regulations and the NESC do appear to treat differently conduit containing energized electrical facilities. Thus, Fibertech and KDL would not oppose limiting its proposals to telecommunications conduit. Because the brunt of the opposition to these conduit proposals comes from electric utilities, with silence from the ILEC commenters, excluding electric conduit from the proposed rules resolves the concerns that have been raised. Thus, the Commission should adopt Fibertech and KDL's proposed rules to ensure fair access to telecommunications conduit.

IV. CONCLUSION

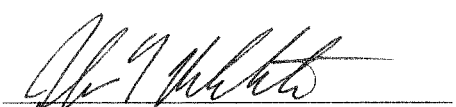
Today, difficulties accessing poles and conduit are standing in the way of

[61] It is in this context that the use of extension arms can be especially valuable to a service provider. If a drop pole required to reach a customer lacks a full 12 inches of available vertical space within the pole's communications zone, the service provider can attach the fiber drop line to that pole by means of a small extension arm to gain the 12-inch clearance recommended by the NESC. If, after the service provider has notified the pole owner or owners of the attachment and submitted its license application, the pole owner has a good reason to direct that the attachment be made directly to the pole, the service provider can pay the necessary make-ready charges and then remove the extension arm once the recommended 12 inches are cleared vertically. (Using boxing instead of an extension arm in such a circumstance is a less favorable solution, because the service provider would have to disconnect its customer to un-box the pole if the pole owner reasonably objected to the boxing.)

[62] Comments of the Coalition of Concerned Utilities at 91-93 (filed Mar. 7, 2008).

competition and consumer choice. New entrants stand ready to bring all-fiber networks directly to consumers that today lack access to such high-bandwidth connections or that lack competitive alternatives to incumbent providers. But they cannot deploy these services without fair and reasonable access to poles and conduit. Congress, this Commission, and the states have already taken important steps to enable this access, but the comments in this proceeding demonstrate that these steps have not prevented competition-killing delays and costs imposed by pole owners. It is time for this Commission to take the logical next step by codifying its precedents and the best practices of state commissions and fair-minded utilities. These simple reforms, which incorporate objective safety codes and standards, will enable all to benefit from our common pole and conduit infrastructure.

Respectfully submitted,



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